IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04/03/2003

CORAM

THE HONOURABLE MR.JUSTICE A.S.VENKATACHALAMOORTHY
AND
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

A.S.No.891 of 1987
and
CMP Nos.13815/97 and 5560/98

Perianayagasamy Madrid (died)
rep. by his Legal Representative
Swapna Ghosai .. Appellant

-Vs-

1. Marie Yvette Gisele Madrid
2. Iven Manjin Madrid
3. Marie Loudes Rosalie Madrid
4. Marie Reneline Francoise Madrid
5. Marie Antonie Francois
Alphonse Madrid
(Respondents 2, 3 & 5 represented
by Power of Attorney namely R1
Marie Yvette Gisele by order
of Court dt.23.10.1988 in CMP
16738/88) .. Respondents

This appeal suit has been preferred under S.96 of The Code of Civil Procedure against the judgment and decree of the I Additional Subordinate Judge, Pondicherry made in O.S.No.263 of 1982 and dated 31.8.198 7.

!For Appellant : Mr.M.S.Umapathy

^For Respondents : Mr.T.P.Manoharan

:JUDGMENT
M.CHOCKALINGAM, J.
The plaintiffs are the appellants herein.
2. This appeal is directed against the judgment and decree of the learned I Additional Subordinate Judge, Pondicherry whereby the claim for partition made by the plaintiffs was rejected.
3. The plaintiff Periyanayagasamy Madrid filed the suit with the following averments:
The plaintiff who was working in the Military at France, after retirement, came to Pondicherry and purchased the suit property in the name of

his wife Amalorpava Madrid on 21.9.1939. He paid the sale consideration. He is having three daughters and two sons, the defendants herein. His wife died on 28.4.1961. He had been in peaceful possession and enjoyment of the suit property. He leased out the first floor of the suit property to one Benugoal Ghosai. After the death of his wife, he married Regina Marie. The first defendant forced him to convey his entire share in her favour, which was refused by him. The first defendant beat him. A complaint was lodged to S.H.O., Grand Bazaar, Pondicherry on 6.2.1982. The first defendant admitted her illegal acts. The husband of the first defendant Arpudasamy Thalli at her instigation was threatening to kill him. Because of the misunderstanding between him and his daughter, the first defendant, it became necessary for him to get his share divided absolutely, and hence, he is constrained to file the suit. Under French Law, he is entitled to an absolute and exact one half share. In the remaining half share, he being the husband of Amalorpava Madrid is entitled to 1/4th share. The defendants are entitled to 1/5th share each only from 3/4th in the half share of the suit property. He sold his undivided share in the suit property to Swapna Ghosai by a sale deed dated 22.12.82. He died on 28.2.83. She filed I.A.No.1056/83 to implead herself as legal representative of the plaintiff. The application was allowed, and as such, she is the plaintiff in the suit. She is entitled for the share as asked for. Hence, the suit may be decreed in her favour.

4. The defendants 1, 2 and 5 filed a written statement and two additional written statements denying various allegations in the plaint. They would state that they are the children of the plaintiff; that the suit property was purchased in the name of the wife of the plaintiff from and out of her own funds; that till date it stands in her name; that the first defendant is residing along with her husband in the suit property as a co-owner from 1978; that it is true that the plaintiff has got half the share in the suit property, but he cannot have any usufructuary right over 1/4th share in the remaining share of the suit property; that the claim of the plaintiff in that regard is ill founded; that the defendants 1, 2 and 5 have no objection for partition of the suit property and + share in the suit property alienated to the plaintiff and for the other half share being divided into five shares and 1/10 share alienated to each defendant herein; that the plaintiff had already threatened the defendants that he would proceed in the name of his second wife and purchase properties in her name to defeat the rights of the defendants; that the plaintiff should be restrained by an order of permanent injunction from alienating his + share; that the plaintiff had mortgaged the suit property to Sri B.N. & Sons and received a loan of Rs.12,250/-, and therefore, he is responsible to pay back the debt from and out of his + share, and the said mortgage will not bind the shares of the defendants in the suit property; that the fifth defendant had paid Rs.5,000/- to the mortgagee at the request of the plaintiff; that under the French Code Civil, third party purchasers of the co-owners, i.e. plaintiff and the defendant, can be excluded from participating in the partition along with the remaining heirs by paying the price of the shares that they have purchased; that in case any of the defendants or the plaintiff had already sold their shares to third parties, the defendants 1, 2 and 5 are prepared to purchase such shares; that they may be included as defendants in order to enable the Court to adjudicate the issue effectively; that the defendants 1, 2 and 5 are entitled to their shares in the rental incomes of the suit property; that the

tenant may be directed to pay the municipal tax arrears and deposit the future rents into the Court; and that a preliminary decree for partition of 1/5 share to each of the defendants 1, 2 and 5 and for separate possession of the same after the final decree may be passed, and the plaintiff should be restrained by an order of permanent injunction from alienating his + share in the suit property.

5. The defendants 1, 2 and 5 would further state that the plaintiff who is a third party stranger, cannot participate in the partition; that since the defendants 1, 2 and 5 sought for a counter claim for partition and permanent injunction, the alleged transfer of the suit property by the deceased plaintiff in favour of the present plaintiff is not valid and binding against them; that Swapna Ghosai was a stranger to the family of Periyanayagasamy Madrid; that she has no right to claim partition in the estates of the deceased Periyanayagasamy Madrid; that the said transfer is fraudulent, collusive and effected only to defeat the lawful rights of the defendants; that it is also hit by S.52 of the Transfer of Property Act; that she ought to have valued the suit at Rs.30,000/-; that she cannot continue the partition suit in the place of deceased plaintiff; and hence, the suit may be dismissed and the counter claim be ordered.

6. The plaintiff filed a reply statement alleging that after the death of Periyanayagasamy Madrid, the claim for usufructuary right has been given up by way of amendment; that the reliefs sought for by the defendants are not properly valued; that the claim for injunction made by the defendants is infructuous; that the sale deed executed by Periyanayagasamy Madrid itself testifies the fact of his indebtedness; that she has been living in the suit property from 22.12.1982; and hence, the counter claim made by the defendants has to be rejected.

7. The trial Court framed the necessary issues, tried the suit, rejected the claim of the plaintiff and decreed the counter claim of the defendants. Aggrieved plaintiff has brought forth this appeal.

8. The learned Counsel appearing for the appellant would submit that the judgment of the lower Court is not sustainable in law; that the suit property was purchased in the name of Amalorpavamarie Madrid from and out of the monies of her husband Periyanayagasamy Madrid; that Periyanayagasamy Madrid and Amalorpavamarie Madrid who were renounced their Indian personal status and opted for French Civil Code for purposes of personal laws, were renocants; that the property formed part of the assets of the community between the husband and wife as per the French Civil Code; that they became co-owners of the suit property having undivided half share each; that it is pertinent to note that under Article 441 of the French Civil Code, a community is dissolved interalia by death; that after the dissolution of the community, property should be divided equally between the parties or their representatives; that after the death of Amalorpavamarie Madrid on 28.4.1961, the property became divisible equally between Periyanayagasamy Madrid on the one part and the representatives of Amalorpavamarie Madrid namely the defendants 1 to 5 on the other part; that there were strained relationship between the parties; that the pension received by Periyanayagasamy Madrid who was a retired Officer of the French Army, was not sufficient to maintain his standard of living, and hence, he mortgaged his undivided half share in the suit property to the appellant on 19.1.1982; that while the suit was pending, Periyanayagasamy Madrid sold his undivided half share to the appellant for

Krs.30,000/- against which an amount of Rs.19,650/- was adjusted against the mortgage amount and the interest, and the remaining Rs.10,350/- was paid in cash; that on the death of Periyanayagasamy Madrid, the purchaser viz. the appellant filed an application for impleading her as the legal representative of Periyanayagasamy Madrid, which was allowed; that when Article 513 of the French Civil Code which relates to appointing a court advisor for a person who on account of his prodigal acts squanders his father's estate, has not been pleaded nor was there any prayer appointing an advisor, the lower Court was not correct in relying on the said Article; that though the respondents raised an objection that the suit for partition is not maintainable as per Article 841 of the French Civil Code, no objection was raised before the trial Court with regard to the maintainability of the suit; that it is pertinent to note that the trial Court has not given any finding to that effect while dismissing the suit; that Article 841 is applicable only when the transfer is by a co-heir; that in the instant case, the deceased plaintiff Periyanayagasamy Madrid was only a co-owner and not a co-heir; that it has to be noted that the sale of share is also permissible under Article 1129; that as per Article 1131, even the reasons given by Periyanayagasamy Madrid is false, it will have no effect; that under Article 1132, the reasons for transfer need not be expressed in the sale deed; that since the deceased plaintiff Periyanayagasamy Madrid became the absolute owner with regard to half share in the suit property, the sale under Ex.A6 in favour of the appellant is valid in law; that when the defendants have come forward with a plea stating that Ex.A6 is obtained by fraud, coercion and undue influence, they have to establish their case, but in the instant case, they have miserably failed to prove the same; that the plaintiff is entitled to half share in the suit property; that the trial Court has not considered the entire evidence both oral and documentary, and hence, the judgment and decree of the lower Court have got to be set aside and the suit be decreed in favour of the appellant.

9. The learned Counsel appearing for the respondents would argue that the trial Court has well considered the evidence both oral and document and has found that the plaintiff was not entitled to the relief asked for; that it is pertinent to note that the suit house has become the property of the community in view of the provisions under Article 1401(3) and 1402 of French Civil Code; that the husband was entitled to half share therein as a member of the community; that in view of Article 1476, the members of the community viz. Periyanayagasamy Madrid and Amalorpavamarie Madrid had to divide the suit house subject to all rules affecting partition between the co-heirs more particularly, as to warranties which arise i.e. not to allow a stranger purchaser of a share to participate in the partition; that it is pertinent to note that as per Article 841, except the legal heirs, no other person including a relative, who purchased a share from a legal heir, is entitled to seek for partition; that at best, such person is entitled only for refund of the sale price paid by him; that the appellant who is a stranger purchaser of undivided share in the suit property, is entitled only for refund of the sale price allegedly paid by her; that under French Law, father is the ab solute owner of the property acquired by him and he can transfer his share for consideration; that in view of the position of law made in a decision reported in 2002 (3) LW 669, the respondents can question the sale made by their father as a sham transaction and it brought brought about due to mental weakness; that Periyanayagasamy Madrid who was 82 years old, could not have

sufficient mental strength as on the date of sale; that the sale consideration found under the document is very low; that the appellant has not proved the payment of sale consideration; that the reason for sale adduced by the appellant is false; that Periyanayagasamy Madrid was not in need of money, and thus, there is no necessity for him to sell the property; that there are lot of suspicions over the genuineness and validity of the sale; that it is pertinent to note that the appellant has also not prayed for declaration of her title based on the sale deed and proved the same; that for these reasons, the judgment of the trial Court has got to be sustained, and the appeal be dismissed.

10. A civil action seeking for a decree of partition in the suit mentioned house property was originally filed by Periyanayagasamy Madrid. The same was contested by the defendants who were none other than his children through his wife. Pending the suit, he executed a sale deed in respect of half share in the entire property in favour of Smt.Swapna Ghosal, who filed a petition on the death of Periyanayagasamy Madrid, the original plaintiff for impleadment of herself as his legal representative. The said petition was allowed. Thus, she has prosecuted the suit seeking partition of her half share to the suit property. The defendants who were given opportunity to file additional written statements also, interalia would contend that the sale deed that was executed by Periyanayagasamy Madrid in favour of Swapna Ghosal was not valid, since Periyanayagasamy Madrid was not the absolute owner with regard to the half share in the suit property, and he was restrained by the provisions of the French Civil Code from making any alienation; that the sale transaction was not supported by consideration; that the sale was obtained by fraud, coercion and undue influence, and apart from that, the reasons adduced in the sale deed were false.

11. Admittedly Periyanayagasamy Madrid married Amalorpavamarie Madrid on 24.9.1928. The defendants 1 to 5 were the children born out of the said wedlock. The said couple renounced their Indian personal status and opted for French Civil Code for purposes of personal laws, and thus, they were renocants. The suit property was purchased on 19.9.1939 under Ex.A2 a notarial sale deed. The said Amalorpavamarie Madrid died on 28.4.1961. Periyanayagasamy Madrid was serving in French Army, and on his retirement, he settled with other members of the family at Pondicherry. After the death of his first wife, he married Regina Marie, who was living at Pondicherry. The relationship between Periyanayagasamy Madrid and his children, the defendants herein, became strained. Under such circumstances, he filed a suit for partition claiming half share in the suit property. Pending the suit, he executed Ex.A6 a registered sale deed on 22.12.1982 in respect of undivided half share in the suit property to Smt.Swapna Ghosal. Periyanayagasamy Madrid died on 28.2.1983. The alienee under Ex.A6 namely Smt.Swapna Ghosal filed an application and sought for the permission of the Court to prosecute the suit by impleading herself as the legal representative of the said Periyanayagasamy Madrid. Despite contest, the said application was allowed, and thus, she has prosecuted the suit seeking for half share in the suit property. The defendants interalia raising all the above defence have also made a counter claim stating that they were entitled to 1/5th share each in the suit property along with permanent injunction.

12. It was specifically averred in the plaint originally filed by Periyanayagasamy Madrid that the suit property was purchased out of his own

funds, but in the name of his wife. On the contrary, it was contended by the contesting defendants that the suit property was purchased by their mother Amalorpavamarie out of her funds. Both these contentions do not require any consideration in view of the provisions of the French Civil Code as stated above. Admittedly, they were renocants and governed by the French Law. The suit property was purchased on 19.9.1939 during the subsistence of the marriage between Periyanayagasamy Madrid and Amalorpavamarie. Article 1402 of the French Civil Code reads thus:

"All immovables are assumed to be purchased by the community which are not proved to have been either the property of or to have been in husband's or wife's legal possession before the marriage...."

Thus, the property belonged to the community consisting of Periyanayagasamy Madrid and Amalorpavamarie, and each was entitled to half share. It is pertinent to point out at this juncture that the defendants 1, 2 and 5 in their written statement have well admitted the share of Periyanayagasamy Madrid by stating that he was entitled to 50% of the suit property, and hence, Periyanayagasamy Madrid was entitled to the half share in the suit property, as claimed by him in the plaint.

13. The present plaintiff Periyanayagasamy Madrid has claimed partition in respect of the half share on the basis of a sale deed executed by him in respect of his undivided half share under Ex.A6 for a consideration of Rs.30,000/-. The first contention that was raised by the respondents/defendants is that the alienee under Ex.A6 viz. Smt. Swapna Ghosal cannot maintain a suit for partition against the defendants, and if at all she had got any claim in the property, she has to work out the remedy by a separate suit. It is pertinent to note that no such objection was raised by the defendants before the trial Court, nor was there any finding by the Court below in that regard. In support of their contention, they much relied on Article 841 of the French Civil Code which reads thus:

"Any person who is not a heir can be prevented by the co-heirs or anyone of them from taking part in the partition, even though he may be related to the deceased, although he is a person to whom a co-heir has transferred his right to the succession."

A careful reading of the above provision would make it abundantly clear that this stance that was raised by the defendants cannot stand. It is true that the alienee under Ex.A6 was not a heir either to Periyanayagasamy Madrid or his wife Amalorpavamarie. But, the defendants who are the heirs, can well prevent the plaintiff from taking part in the partition, only if there was a transfer of an interest by a co-heir in respect of his right to succession to the alienee. In the instant case the suit property belonged to the community of Periyanayagasamy Madrid and Amalorpavamarie Madrid, and thus, each was entitled to an undivided half share in the suit property. Hence, Periyanayagasamy Madrid was only a co-sharer and not a co-heir. It remains to be stated that under Article 1441 of the French Civil Code, a community gets dissolved interalia by death, and thus, on the death of Amalorpavamarie on 28.4.1961, the community of the said couple got dissolved, and the property, no doubt, became divisible equally between Periyanayagasamy Madrid on the one side and the legal representatives of Amalorpavamarie Madrid on the other. Thus, the Court is unable to notice any legal impediment for the present plaintiff asking for a partition on the strength of Ex.A6 sale deed executed by Periyanayagasamy Madrid in her favour.

14. The sale deed under Ex.A6 executed by Periyanayagasamy Madrid in favour of the present plaintiff viz. Smt.Swapna Ghosal was assailed on different grounds. It was specifically averred by the respondents' side that the same was obtained by fraud, coercion and undue influence. Needless to say that a duty was cast upon the defendants who put forth a plea that Ex.A6 sale deed was not valid, since it was tainted with anyone of the invalidating factors, to prove the same. But, the defendants have miserably failed to prove the said plea.

15. Relying on Article 513 of the French Civil Code, it was contended by the respondents' side that the prodigals are forbidden to alienate the property, and in the instant case, the sale was not valid, since the father, who was a party to the suit, has executed the sale deed on account of his prodigal acts. The Court is unable to see any force in this stance. It remains to be stated that Article 513 of the French Civil Code is related to the appointment of a Court Adviser for a person, who on account of his prodigal acts, squandered his father's estate. Nowhere the defendants have put forth such a plea in the written statement. In the absence of specific pleading to that effect, the said contention cannot be countenanced. Apart from that, no material worth-mentioning was placed by the defendants to hold that he was committing prodigal acts. Admittedly Periyanayagasamy Madrid after the death of his first wife married Regina Marie and was living with her. During the relevant period Periyanayagasamy Madrid was not employed nor had he any source of income except the monthly pension. Under such circumstances, the lower Court was not correct in stating that he had no legal necessity for entering into such a sale transaction. It has to be pointed out at this juncture that Periyanayagasamy Madrid mortgaged his undivided half share in the suit property under a registered deed in consideration of Rs.18,000/- even before filing of the suit, and thus, at the time of the execution of sale, only a sum of Rs.10,350/- was paid in cash to the vendor, after adjusting Rs.19,650/- towards the mortgage debt. Considering the above circumstances and the fact that Periyanayagasamy Madrid was aged 80 years that time, it can well be inferred that he should have sold the property pressed by necessities, and hence, it cannot be stated that he had alienated the property under Ex.A6 sale deed without the personal necessity. This Court is unable to see any merit in all the contentions put forth by the defendants. Without proper appreciation of the position both factual and legal, the lower Court has taken an erroneous view and has dismissed the suit, which has got to be necessarily set aside for the reasons stated above. Therefore, the plaintiffs are entitled to half share in the suit property as asked for in the plaint, while the defendants 1, 2 and 5 are entitled to 1/5th share each in the suit property as asked for in their counter claim.

16. In the result, this appeal suit is allowed, setting aside the judgment and decree of the trial Court. A preliminary decree is granted both in the suit and in the counter claim in respect of half share of the plaintiff and 1/5th share of each of the defendants 1, 2 and 5 respectively in the suit property. In other respects, both the suit and the counter claim are dismissed. Costs in the suit is ordered. The parties will bear their own costs both in the appeal and in the counter claim. Consequently, connected CMPs are closed.

Index: Yes
Internet: Yes

To:
1. The I Additional Subordinate Judge,
Pondicherry.

2. The Record Keeper
V.R.Section
High Court,
Madras.

nsv/